Cause No. PD-0792-17

In the Texas Court of Criminal Appeals

The State of Texas,
Petitioner

v.

Amanda Waters,
Respondent

On Petition for Discretionary Review from the Court of Appeals,
Second District in Cause No. 02-16-00274-CR

Respondent's Reply Brief

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ORAL ARGUMENT GRANTED

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STATEMENT OF THE CASE

On October 31, 2015 while on community supervision, Respondent was arrested for Driving While Intoxicated ("DWI").[1] On December 23, 2015 the State filed a Motion to Revoke in cause number 62,998-F alleging, *inter alia*, that Respondent had violated the terms and conditions of community supervision by committing the new offense of DWI.[2] After a hearing on the State's Motion to Revoke, the Court entered a finding that the allegation was "not true."[3] The State also filed an information in cause number 68,878-F accusing Respondent of committing the same DWI the State had alleged in its Motion to Revoke.[4] Respondent filed an Application of Writ of Habeas Corpus, alleging that the court's previous finding of not true at the probation revocation barred the State from prosecuting the new offense.[5] The trial court granted Respondent's Application and the State appealed.[6] The Second Court of Appeals affirmed the judgment of the trial court.[7] The State then filed its Petition for Discretionary Review and subsequent brief on the merits.

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[1] C.R. 1:56.
[2] *Id.*
[3] *Id.*
[4] *Id.*; C.R. 1:6.
[5] C.R. 1:31-34.
[6] C.R. 1:56-57; C.R. 1:58-59.
[7] *State v. Waters*, 2017 WL 2877086 (Tex. App.—Fort Worth July 6, 2017, pet. granted).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has already been granted by the Court.

ISSUE PRESENTED

The Court has ordered briefing on the issue of:

> Whether this Court should explicitly overrule *Tarver* and reject the concept on common law collateral estoppel since collateral estoppel should not bar the State from prosecuting a criminal offense following an adverse finding at a probation revocation hearing. C.R. 1:53, 57.

STATEMENT OF FACTS

Respondent was placed on community supervision in cause number 62,998-F in County Court at Law Number Two in Wichita County, Texas.[8] While on probation, the State alleged in a Motion to Revoke that Respondent had violated the terms and conditions of probation by, *inter alia*, committing the offense of DWI.[9] The State also filed an information alleging the new DWI in cause number 68,878-F in the same court.[10]

At the hearing on the Motion to Revoke, the State attempted to prove Respondent had committed the new DWI by soliciting testimony from Respondent's probation officer that Respondent had been arrested for DWI while on probation.[11] The State elected not to present any further testimony

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[8] C.R. 1:56.
[9] *Id.*
[10] *Id.*; C.R. 1:6.
[11] Defendant's Exhibit 3 pp. 11-27.

or evidence of the new offense. After the close of the State's case, Respondent requested a directed verdict on the grounds that, *inter alia*, the State had failed to meet its burden of proving Respondent committed the offense of DWI while on community supervision.[12] The court made a specific finding on the record that the alleged violation was not true.[13] The court went on to summarize the ways the State could have met its burden:

> When the State alleges a new offense, they have to prove that. Now they don't have to prove it beyond a reasonable doubt. They could have brought the officers involved in this case to court, and they would not have to prove it to a jury, they just have to prove it to me by what's called a preponderance of the evidence; that makes their jobs easier, but the fact that a person is arrested is insufficient to prove a new offense and so that one I will find not true.[14]

The trial court memorialized that finding in its order on the State's Motion to Revoke.[15] Subsequently, Respondent filed a pretrial Application for Writ of Habeas Corpus in cause number 68,878-F alleging that the State was barred from relitigating the fact of whether Respondent had committed the offense of DWI as the court had already found the allegation not true.[16] At a hearing on Respondent's Writ of Habeas Corpus, the State admitted *Ex*

[12] Defendant's Exhibit 3 pp. 27-28.
[13] Defendant's Exhibit 3 pp. 28.
[14] Defendant's Exhibit 3 pp. 28-29.
[15] Defendant's Exhibit 2.
[16] C.R. 1:31-34.

Parte Tarver was good law and applied to this case.[17] The trial court made specific findings of facts and conclusions of law in case number 68,878-F finding the allegations contained in the information to be the same as in the State's motion to revoke, that the court had previously found those allegations "not true" and dismissed the case.[18]

SUMMARY OF THE ARGUMENT

Collateral estoppel in Texas criminal law has its roots in both the Double Jeopardy Clause of the Fifth Amendment as well as common law administrative principles. *Ex Parte Tarver* is a very narrow holding that only applies when the State attempts to relitigate a factual issue that it has previously failed to prove before and the court has made a specific finding on that issue. *Tarver* has never been overruled by either a federal or Texas court and remains good law as it has for decades. This Court has consistently upheld *Tarver* when given opportunities to overrule it, in part because Texas probation revocation proceedings are more analogous to criminal trials than administrative proceedings. The State presents in its brief on the merits for the first time the argument that the trial court never specifically decided the allegation Respondent committed a new offense.

[17] R.R. 2:10. ("Your Honor, the State expressly acknowledges that Counsel for defense has brought *Tarver* and the authority in Tarver is adverse in [sic] the State's position. Consequently the State recognizes this Court is bound by the *Tarver* decision…")
[18] C.R. 1:56-57.

Not only has the State failed to preserve that argument, it is plainly contradicted by the order issued by the court in this case.

ARGUMENT

I. THIS COURT SHOULD AFFIRM *TARVER* AS IT REMAINS GOOD LAW.

The State alleges in its brief on the merits that *Tarver* is no longer good law. However, *Tarver* has been widely cited by Texas courts since it was decided and has never been overruled by either a Texas or federal court. The holding in *Tarver* has its basis in both federal and state collateral estoppel, and the same principles that led this Court to decide *Tarver* still apply today to collateral estoppel arising out of probation revocation proceedings.

A. FEDERAL COLLATERAL ESTOPPEL

Tarver bases its holding in part on the United States Supreme Court's application of collateral estoppel to criminal matters laid out in *Ashe v. Swenson.*[19] However, the application of collateral estoppel to federal criminal law has its roots over fifty years earlier. In *United States v. Oppenheimer*, 242 U.S. 85 (1916), the Court held what had originally been a principle of purely civil law applied to criminal as well through the Fifth

[19] *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986); *Ashe v. Swenson*, 397 U.S. 436 (1970).

Amendment.[20]

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice…[21]

Expanding on this reasoning, the Supreme Court in *Ashe* looked at whether collateral estoppel is a part of the Fifth Amendment's guarantee against double jeopardy.[22] The Court held that "if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact we must decide through an examination of the entire record."[23] It noted that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[24] The rule of collateral estoppel in criminal cases is "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but

[20] *United States v. Oppenheimer*, 242 U.S. 85, 88 (1916).
[21] *Id.*
[22] *Id.*; U.S. CONST. amend. V.
[23] *Ashe* 397 U.S. 436 at 442-43.
[24] *Id.* at 443.

with realism and rationality."[25] This doctrine is applied to the states through the Fourteenth Amendment.[26] Although subsequent courts have interpreted *Ashe v. Swenson* in different ways, the United States Supreme Court has never overruled the doctrine that collateral estoppel in criminal cases springs from the Double Jeopardy Clause of the Fifth Amendment.

1. THE FIFTH CIRCUIT HAS NEVER OVERRULED *TARVER*'S APPLICATION OF COLLATERAL ESTOPPEL TO TEXAS PROBATION REVOCATION PROCEEDINGS.

The State cites two Fifth Circuit federal cases for the contention that *Tarver* was overruled. However, neither of the cases cited by the State holds that collateral estoppel does not apply to Texas probation revocation hearings.

The first case cited by the State is *Showery v. Samaniego*.[27] In *Showery*, the defendant was free on an appellate bond for his previous conviction of murder.[28] While on his appellate bond, he allegedly committed the offense of involuntary manslaughter.[29] The State sought to revoke his bond alleging the new offense violated his bond condition.[30] The Texas Court of Criminal Appeals held that the State had failed to meet its

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[25] *Id.* at 444.
[26] *Benton v. Maryland*, 395 U.S. 784 (1969); U.S. CONST. amend. XIV.
[27] *Showery v. Samaniego*, 814 F.2d 200 (5th Cir 1987).
[28] *Id.* at 201.
[29] *Id.*
[30] *Id.*

burden of proof that the defendant committed the offense.[31] The defendant then filed a Writ of Habeas Corpus alleging the previous finding prohibited him from being tried for the new offense.[32] Critically, *Showery* is not called upon to consider probation revocation hearings in Texas, but rather appellate bond revocation hearings.

When considering the "essentially criminal" nature of probation revocations in Texas, it is important to note the differences between the limited rights available to a defendant on an appeal bond versus a probation revocation proceeding in Texas. A defendant on an appeal bond is not entitled to formal written notice of the State's intent to revoke his bond.[33] He is not entitled to a revocation hearing on whether the court should revoke his bond.[34] A court does not have to find when revoking an appeal bond that a defendant has committed a new offense, only that they are likely to do so.[35] In fact, a court can revoke a defendant's appeal bond even if the court did not send any conditions of bond.[36] In short, neither the rights nor the procedure necessary to revoke an appeal bond are similar to what is required to revoke a probationer. Given the differences in an

[31] *Id.*
[32] *Id.*
[33] *Smith v. State*, 993 S.W.2d 408, 412 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).
[34] Tex. Code. Crim. Proc. art. 44.04(c) (West 2018); *Robinson v. State*, 700 S.W.2d 710, 712 (Tex. App.—Houston [14th Dist.] 1985, no pet.).
[35] *Putnam v. State*, 582 S.W.2d 146, 150 (Tex. Crim. App. 1979).
[36] *Ex parte LeBlanc*, 615 S.W.2d 724, 726 (Tex. Crim. App. 1981).

appeal bond and probation, *Showery* is consistent with the narrow holding in *Tarver* and merely demonstrates the administrative nature of appellate bond revocation.

The other Fifth Circuit case cited by the State concerns an individual on parole, not probation.[37] In *Stringer*, a defendant on parole was indicted on four new felonies. Subsequently, a hearing officer found that the defendant had violated his parole by committing two of the felonies, but that there was insufficient evidence to show he committed the other two.[38] The defendant argued, *inter alia*, that State could not prosecute him on the two felonies on which the hearing officer found there was insufficient evidence.[39] Although the court in *Stringer* opined that *Tarver* would be a state claim of collateral estoppel rather than federal as applied to the instant case, it failed to take into account the narrow ruling of *Tarver* only applying to probation revocations rather than administrative hearings such as parole revocation.[40]

[37] *Stringer v. Williams*, 161 F.3d 259 (5th Cir. 1998).
[38] *Id.*
[39] *Id.*
[40] *Id.* at 263.

2. EVEN IF THE FIFTH CIRCUIT INTERPRETS FEDERAL COLLATERAL ESTOPPEL DIFFERENTLY THAN TEXAS COURTS, TEXAS COURTS' INTERPRETATION OF FEDERAL LAW IS NO LESS AUTHORITATIVE THAN THAT OF THE FIFTH CIRCUIT.

The Fifth Circuit cannot overrule *Tarver* because the Texas Court of Criminal Appeals has the equal right to interpret federal Constitutional issues as a lower federal court. Under the concepts of federalism, the Supremacy Clause requires that state laws must give way to federal laws.[41] However, lower federal courts cannot bind state courts to their interpretation of federal Constitutional issues.[42] Justice Thomas summed up the dichotomy between how state and lower federal courts can interpret the same Constitutional issue in different ways. "In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."[43] He noted that while a state trial court is bound by the Supreme Court and higher state courts' interpretation of federal law, it is not obligated to follow a federal court of appeal's interpretation of federal law.[44]

Likewise, both the Texas Supreme Court and Texas Court of

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[41] *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).
[42] *Stewart v. State*, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984). ("We would remind appellant that this Court is not bound by the decisions of any lower federal court.").
[43] *Lockhart* 506 U.S. 364 at 376.
[44] *Id.*

Criminal Appeals have upheld their judicial independence from Fifth Circuit interpretations of the Constitution. The Texas Supreme Court held that "[w]hile Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court."[45] Likewise, the Texas Court of Criminal Appeals has similarly found that they are not bound by the Fifth Circuit's interpretations of federal constitutional issues.

This is not the first time the State has attempted to use *Stringer* and *Showery* to overturn *Tarver*. In *Reynolds v. State*, the Court was presented with the opportunity to overturn *Tarver* based on the same Fifth Circuit cases described previously in a case where a defendant prevailed at a prior administrative proceeding for a driver's license revocation and alleged collateral estoppel in the concurrent prosecution for Driving While Intoxicated.[46] Instead, this Court when discussing those same cases recognized this principle of federalism and unequivocally endorsed *Tarver* as an interpretation of federal constitutional law.

[45] *Penrod Drilling Corp. v. Williams*, 868 SW 2d 294, 296 (Tex. 1993).
[46] *Reynolds v. State*, 4 S.W.3d 13, 20 (Tex. Crim. App. 1999).

> Tarver is inconsistent with Fifth Circuit case law which based on *Breed* holds "the double jeopardy clause does not apply to parole and probation revocation proceedings" because they are not "essentially criminal." *Showery* erroneously characterized *Tarver* as "extending state constitutional guarantees beyond those afforded by the federal Constitution." However, *Tarver* was decided as a matter of federal constitutional law. Of course, we are not required to follow Fifth Circuit federal constitutional interpretations. (citations omitted).[47]

The Court went on to note that while *Tarver* prevailed under Texas' interpretation of federal collateral estoppel, he would have lost in federal court.[48]

The State's brief claims that *Tarver* is based on an incorrect interpretation of federal collateral estoppel.[49] Such an argument ignores the fact that Texas, and her courts, are entitled to their own equally valid interpretation of how collateral estoppel applies to criminal prosecutions. Under our Constitution, both interpretations are equally valid. Although Texas Courts of Appeals have been careful to uphold the narrowness of the ruling originally expressed in *Tarver*, neither they nor the Texas Court of Criminal Appeals have ever overruled *Tarver*.

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[47] *Id.* at 32 n. 17.
[48] *Id.*
[49] The State's Brief on the Merits pp. 22-23.

II. COLLATERAL ESTOPPEL SHOULD APPLY TO PROBATION REVOCATION HEARINGS.

When considering whether collateral estoppel bars a subsequent prosecution or bars relitigation of certain facts during a subsequent prosecution, a court must determine (1) exactly what facts were necessarily decided in the first proceeding; and (2) whether those necessarily-decided facts constitute essential elements of the offense in the second trial.[50] The question is not whether there is a possibility that an ultimate fact was determined adversely to the prosecution; rather, the outcome of the earlier proceeding must necessarily have been grounded on the issue which the defendant seeks to foreclose from relitigation.[51] In probation revocation hearings, for collateral estoppel to apply there must be a fact-finding by the first court at the revocation proceeding that illustrates the basis for the court's decision and that fact-finding must be adverse to the State on a fact elemental to the subsequent prosecution.[52]

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[50] *Ex parte Taylor*, 101 S.W.3d 434, 440 (Tex.Crim.App.2002).
[51] *Ex parte Bolivar*, 386 S.W.3d 338, 344 (Tex. App.—Corpus Christi 2012, no pet.)(citing *Ladner v. State*, 780 S.W.2d 247, 254 (Tex.Crim.App.1989).
[52] *Jaime v. State*, 81 S.W.3d 920, 926 (Tex.App.-El Paso 2002, pet. ref'd); *State v. Getman*, 255 S.W.3d 381, 384 (Tex.App.-Austin 2008, no pet.).

A. *EX PARTE TARVER* IS INTENTIONALLY A NARROW HOLDING

Tarver's application of collateral estoppel to probation revocation cases applies, by design, to a very narrow subset of cases.[53] For a defendant to have a successful claim under *Tarver* he must first be sentenced to community supervision. While on community supervision, the State must allege a new offense in its motion to revoke.[54] The State must not abandon that claim before or during the proceeding and must fail to put on enough evidence the defendant committed the offense to meet the preponderance of the evidence standard.[55] A decision by the trial court to overrule a motion to revoke does not, in itself, trigger collateral estoppel.[56] The trial court must make a specific finding of fact in its written order that the allegation is "not true."[57] The State must subsequently attempt to prosecute the defendant for the exact same offense that was litigated at the probation revocation proceeding.[58] The reviewing court must have a transcript of the

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[53] *Ex parte Tarver*, 725 S.W.2d at 200. ("We emphasize the narrowness of this holding.").
[54] *Id.*
[55] *Id.*
[56] *State v. Nash*, 817 S.W.2d 837, 842 (Tex.App.—Amarillo 1991, pet. ref'd.); *Ex parte Tarver*, 725 S.W.2d at 200.
[57] *Id.*; *see also Ex parte Bolivar*, 386 S.W.3d 338, 345 (affirmed denial of pretrial writ of habeas corpus on the grounds that, despite the district court's comments on the record, revocation order did not specifically find the murder allegation "not true.")
[58] *Id.*

prior proceeding.[59] If the defendant's case does not proceed with all of these elements and in this order, then he will not prevail.[60]

B. TEXAS COURTS HAVE CONSISTENTLY UPHELD *TARVER*

Much of the case law surrounding *Tarver* merely upholds its narrowness. Consistent with its original mandate that it be narrowly upheld, courts have resisted attempts to enlarge the scope of *Tarver* to cover hearings and motions to which the principles of collateral estoppel do not apply. Courts have held *Tarver* does not bar a district attorney from litigating the same issues in a DWI that were decided adversely to the Department of Public Safety in a prior administrative proceeding for a driver's license revocation.[61] *Tarver* does not cover pretrial non-final rulings by the trial court such as a motion to suppress.[62] It does not apply if an appellate court overturns a denial of bail at a pretrial hearing.[63] Nor does it apply to successive motions to revoke based on the same condition of probation if new and different factual allegations are litigated in the second motion.[64]

Meanwhile, in situations where the requirements in *Tarver* have been

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[59] *Guajardo v. State*, 109 S.W.3d 456, 461 (Tex. Crim. App. 2003).
[60] *Id.*
[61] *Reynolds v. State*, 4 S.W.3d 13; *Ex parte Serna*, 957 S.W.2d 598, 599 (Tex. App.—Fort Worth 1997, pet. ref'd); *State v. Brabson*, 976 S.W.2d 182, 183 (Tex. Crim. App. 1998).
[62] *State v. Rodriguez*, 11 S.W.3d 314, 322 (Tex. App.—Eastland 1999, no pet.).
[63] *Ex parte Lane*, 806 S.W.2d 336, 338 (Tex. App.—Fort Worth 1991, no writ).
[64] *Ex parte Byrd*, 752 S.W.2d 559, 564 (Tex. Crim. App. 1988).

followed and the principles of collateral estoppel would logically apply, appellate courts, including the Texas Court of Criminal Appeals, have consistently endorsed *Tarver*'s application to probation revocation proceedings.

In *Jamie v. State*, the defendant was placed on community supervision for ten years following a conviction for subsequent driving while intoxicated.[65] While on probation, he was charged with aggravated assault.[66] The indictment alleged the defendant "used and exhibited a deadly weapon, to-wit: a motor vehicle, during the commission of and immediate flight from said offense."[67] During the cross examination of the State's witness, the trial court denied the State's motion to revoke and no evidence to support the State's allegation was presented.[68] The defendant subsequently brought a pretrial writ of habeas corpus seeking dismissal of the indictment.[69] The court, in its order denying the defendant's writ, issued the following order:

> The Court FINDS the allegation that the defendant was driving a motor vehicle on or about December 13, 2000, was litigated in the revocation of probation hearing on February 23, 2001, in Cause 990D03645. No evidence of the defendant driving a

[65] *Jaime v. State*, 81 S.W.3d 920, 922.
[66] *Id.*
[67] *Id.* at 23.
[68] *Id.*
[69] *Id.*

> motor vehicle was presented. The Court made no specific finding on the issue, but the motion to revoke was DENIED.[70]

The El Paso Court of Appeals found the elements of *Tarver* had been met and dismissed the indictment.[71] Specifically, it found that *Tarver* applied regardless of the fact the State put on no evidence of the allegation.[72] It held "[t]he State had the opportunity to present witnesses at the probation revocation hearing and failed to do so. It is 'now trying to relitigate the same fact issue.'"[73]

In *Wafer v. State*, the defendant was indicted in Swisher County for delivering cocaine within 1000 feet of a playground.[74] The State used the same allegation as contained in the indictment in a motion to revoke in Hale County.[75] After a hearing, the trial court in Hale County dismissed the motion to revoke stating, *inter alia*, "I'm not convinced by a preponderance of the evidence today based on the evidence I have heard today that this is true."[76] The defendant filed a pretrial writ of habeas corpus alleging collateral estoppel through the application of *Tarver*. The Amarillo Court of Appeals reversed the order denying the defendant's pretrial writ and

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[70] *Id*. at 24.
[71] *Id*. at 26.
[72] *Id*.
[73] *Id*. at 27.
[74] *Wafer v. State*, 58 S.W.3d 138, 139 (Tex. App.—Amarillo 2001, no pet.).
[75] *Id*. at 140.
[76] *Id*.

dismissed the indictment.[77]

This Court has also upheld *Tarver* since its inception. In *Reynolds v. State*, this Court not only reaffirmed that *Tarver* is based on federal collateral estoppel, but also outlined how "Common-law 'administrative collateral estoppel' principles support the result in Tarver as well.[78] More recently, in 2012 this Court declined to overrule *Tarver* in a situation where one county alleged a defendant violated probation by committing an offense in another county.[79]

C. COURTS SHOULD CONTINUE TO UPHOLD *TARVER* UNDER COMMON LAW COLLATERAL ESTOPPEL PRINCIPLES DUE TO THE "ESSENTIALLY CRIMINAL" NATURE OF TEXAS PROBATION REVOCATION PROCEEDINGS.

Following *Reynolds* and *Ex Parte Doan*, the Texas Court of Criminal Appeals has discussed upholding *Tarver* under the principles of common-law collateral estoppel in addition to federal law.[80] In *Doan*, this Court specifically discussed at length that the

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[77] *Id*. at 141-142.
[78] *Reynolds* 4 S.W.3d 13 at n. 18. ("Common-law 'administrative collateral estoppel' principles support the result in *Tarver* making it unnecessary to resort to federal constitutional collateral estoppel principles to support it.")
[79] *Ex parte Doan*, 369 S.W.3d 205, 212 (Tex. Crim. App. 2012)(n.33 "We are not overruling *Tarver*.").
[80] *Reynolds* 4 S.W.3d 13 at 21 n.18. ("Common-law "administrative collateral estoppel" principles support the result in Tarver making it unnecessary to resort to federal constitutional collateral estoppel principles to support it. A criminal prosecution in cases like Tarver can violate common-law "administrative collateral estoppel" principles without also violating federal constitutional collateral estoppel principles under *Ashe*.")(citations omitted); *Doan* 369 S.W.3d 205 at 213 n.33.

collateral estoppel principles in *Tarver* applied equally to federal constitutional law as well as common-law.

> While Tarver did cite to some federal Supreme Court cases, it is not obvious whether Tarver's holding was based in Constitutional law or common law; given Tarver's explicit statement that double-jeopardy principles were not implicated by revocation hearings, and given that there were no prior cases from this court applying collateral estoppel, it is possible to read Tarver as using the federal cases only as explanations of common-law doctrine.[81]

At its heart, *Tarver's* application of collateral estoppel is based on the unique and "essentially criminal" nature of Texas probation revocation proceedings.[82] Although previous cases have called probation revocations "administrative in nature," in *Ex Parte Doan* this court clarified that Texas probation revocation hearings have more in common with trials than the administrative systems set up in other states.[83] For example, in a Texas probation revocation hearing the State is represented by a prosecutor.[84] The hearing is before a judge.[85] The formal rules of evidence apply as well as the exclusionary rule.[86] A defendant can appeal the outcome to the court

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[81] *Id.*
[82] *Reynolds* 4 S.W.3d 13 at 20.
[83] *Doan* 369 S.W.3d 205 at 210 citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).
[84] Tex. Code Crim. Proc. Ann. art. 42.12, § 21 (West 2018).
[85] *See Id.*
[86] *Compare* Tex.R. Evid. 101(d) (list of criminal proceedings at which Texas Rules of Evidence are inapplicable does not include revocation hearings) with, e.g., Miss. R. Evid. 1101(b)(3) (Mississippi Rules of Evidence inapplicable at revocation hearings). *See*

of appeals should his community supervision be revoked.[87] Contrasted with our system is probation revocation in an administrative system described by the Supreme Court in *Scarpelli*, where:

> [A] criminal trial, [in which] the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights.... In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation [toward rehabilitation]; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.[88]

As previously discussed, Texas courts have consistently declined to extend *Tarver* to true administrative proceedings such as driver's license suspensions and parole hearings because they share none of the "essentially criminal" elements that make our probation revocation hearings more like trials than what other states consider administrative proceedings.

Moore v. State, 562 S.W.2d 484, 486–87 (Tex. Crim. App. 1978).
[87] Tex. Code Crim. Proc. 42A.755(e).
[88] *Gagnon*, 411 U.S. 778, 779.

D. OVERTURNING TARVER WOULD LEAD TO INCONSISTENT RULINGS IN CASES SUCH AS THIS.

One of the benefits of upholding *Tarver* is that collateral estoppel allows for judicial economy and prevents a trial court from issuing inconsistent rulings on the same matter. In this case, both Respondent's probation revocation hearing and subsequent DWI case were heard in the same court in front of the same judge. The judge made a specific finding at the revocation hearing that the State had failed to prove its case by a preponderance of the evidence and consequently that the allegation was "not true." Although trial court granted Respondent's habeas writ, had it not dismissed the information Respondent's case could have gone to trial.[89] At trial, the same court that had previously decided the allegation before it was "not true" by a preponderance of the evidence would again be called upon to decide whether Respondent was guilty beyond a reasonable doubt of the same allegation. It would make this decision either by acting as the trier of fact or in a jury trial when ruling on a motion for directed verdict. If the court were to find beyond a reasonable doubt that Respondent committed the offense of DWI, it would conflict with its own prior ruling that the allegation was "not true" by a preponderance of the evidence. Not only does collateral estoppel conserve judicial time and attention by

[89] C.R. 1:40-41. The State had filed a motion for continuance a few days prior to trial requesting the jury trial date be moved due to the unavailability of a witness.

keeping courts from endlessly ruling on the same factual issues, it also prevents scenarios such as the one described above where the court could potentially be forced to offer contradicting rulings on the same factual issues.

III. THE TRIAL COURT FROM RESPONDENT'S PROBATION REVOCATION HEARING NECESSARILY DECIDED THE ISSUE OF WHETHER RESPONDENT COMMITTED A NEW OFFENSE WHILE ON PROBATION.

The State argues in subpart B of its Brief on the Merits that this Court should find that the rulings from Respondent's probation revocation hearing do not meet this Court's collateral estoppel test because Respondent's new offense was not necessarily decided by the trial court.[90] However, this issue is not ripe for review as the State failed to raise this argument either to the trial court nor in its brief to the Second Court of Appeals. Moreover, the trial court did make a specific finding in its rulings from the probation revocation hearing that the State's allegation of a new DWI offense was "not true."

[90] The State's Brief on the Merits pp. 34-36.

A. THE STATE HAS FAILED TO PRESERVE FOR APPEAL THE ISSUE OF WHETHER THE TRIAL COURT FAILED TO "NECESSARILY DECIDE" RESPONDENT'S NEW OFFENSE.

This Court in its discretionary capacity has the power to review decisions by the courts of appeals.[91] Like a defendant, if the State fails to argue an issue to the trial or appellate court it waives that issue on appeal.[92] In this case, the State filed no written response to Respondent's Application for Writ of Habeas Corpus. Instead, the State made an oral argument at the hearing on Respondent's Application.[93] At that hearing, the State at no point claimed that the trial court did not necessarily decide the new offense at the probation revocation hearing.[94] While the State argued the issue should be revisited by this Court, it conceded at the hearing that the trial court is bound by *Ex Parte Tarver* and *Ex Parte Doan* and that authority was adverse to the State's position.[95] Likewise, the State failed to brief this issue to the Second Court of Appeals. The State's brief argues a single issue that *Ex Parte Tarver* is no longer good law.[96] It never argued that the trial court in this case did not decide the issue of the allegation Respondent committed a new offense. The Court of Appeals' opinion does not address

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[91] Tex. Const. art. V, § 5.
[92] *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998); *State v. Consaul*, 982 S.W.2d 899, 902 (Tex. Crim. App. 1998).
[93] R.R. 2:10-11.
[94] *Id.* at 10.
[95] *Id.*
[96] The State's Brief on the Merits pp. 20-35.

the State's new argument because the State failed to brief the issue.[97]

B. EVEN IF THE STATE PRESERVED THIS ARGUMENT, THE TRIAL COURT'S RULINGS PLAINLY DECIDED THE ALLEGATION RESPONDENT COMMITTED A NEW OFFENSE WAS "NOT TRUE."

The State claims in its Brief on the Merits that because the trial court found one allegation true, "the other allegations were not necessarily decided."[98] The State fails to note that the trial court specifically found the allegation that Respondent committed a new offense "not true" at the probation revocation hearing both on the record and in its judgment. Furthermore, the trial court again found in its findings of fact and conclusions of law in its order granting Respondent's Application for Writ of Habeas Corpus that Petitioner's allegation was "not true."

The issue of whether Respondent committed a new offense of driving while intoxicated was litigated in the probation violation hearing. The State included the allegation in its motion to revoke as a violation of community supervision and Respondent entered a plea of "not true."[99] The State attempted to prove the new offense through the testimony of Garon Jetton, Respondent's community supervision officer.[100] Though Mr. Jetton was aware of Respondent's arrest for the new offense, he had no personal

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[97] *State v. Waters*, 2017 WL 2877086.
[98] The State's Brief on the Merits pp. 34.
[99] Defendant's Exhibit 2 pp. 9.
[100] *Id.* at 17.

knowledge of the facts surrounding the arrest.[101] Though the State had the opportunity to introduce other evidence Respondent committed the offense, it chose not to. At the close of the State's case, Respondent requested a directed verdict on the grounds the State had failed to prove by a preponderance of the evidence that Respondent committed the new offense.[102]

Although a trial court is not required to rule on each specific allegation in a motion to revoke, in this case the court did. The trial court, in addressing Respondent's motion for directed verdict, specifically found the allegation of the new offense "not true."[103] This finding was later memorialized in the trial court's order continuing Respondent on probation as it again found the allegation "not true."

Later, in its order granting Respondent's Application for Writ of Habeas Corpus, the trial court again referenced its prior ruling in paragraph seven of its findings of fact and conclusions of law:

> The Court has previously found that the DAO's allegation that Waters had committed a DWI in Wichita County, Texas, on October 31, 2015, the alleged violation of Term One, to be not true" based on the State's failure to prove its case by a preponderance of the evidence at the hearing on February 18, 2016.[104]

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[101] *Id*. at 25.
[102] *Id*. at 27-28.
[103] *Id*. at 28.
[104] C.R. 1:57.

The trial court's own order shows it considered and necessarily decided the issue of whether Respondent committed a new offense on probation. It found that allegation not true. Appellate deference to a trial court's factual findings in this context is mandated unless an appellate court concludes that the record fails, utterly, to support the factual finding.[105]

CONCLUSION

The State is asking this Court to overturn over three decades of precedent due to actions of its own making. In the probation revocation hearing the State alleged in its Motion to Revoke that Respondent committed the new offense of DWI while on community supervision. The State was not obligated to allege this new offense in its Motion to Revoke and could have relied on its other allegations not related to the new offense. If the State decided subsequent to filing the Motion to Revoke that it wished not to prove the new offense at the hearing it could have abandoned the allegation prior to the hearing and proceeded on the other violations. Instead, it chose to present the issue to the trial court. Likewise, the State could have offered testimony from the arresting officer or other witnesses to prove the allegation. Since the State need only prove a violation by a preponderance of the evidence it logically would not need to put on all of

[105] *State v. Groves*, 837 S.W.2d 103, 106 (Tex.Crim.App.1992).

the evidence required to prove its case beyond a reasonable doubt. Instead, the State chose to prove the offense by soliciting the testimony of Respondent's probation officer who had no personal knowledge of the facts surrounding the new violation and could only testify Respondent had been arrested.

Collateral estoppel has a long and storied history in Texas criminal jurisprudence with roots in both federal constitutional law as well as common-law principles. *Tarver* is by design a narrow holding. However, it is an important one that prevents the State from choosing to litigate and later relitigate the same factual issues once a court has specifically decided those issues. By upholding *Tarver*, the Texas Court of Appeals can help ensure probation revocation hearings in Texas continue to be fair for defendants as well as preventing the State from burdening the judicial system with endless bites of the same apple.

PRAYER

Respondent prays the Texas Court of Criminal Appeals affirms the judgment of the Second Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that this document was produced on a computer using Microsoft Word and contains 5,710 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Scott Stillson
Scott Stillson

CERTIFICATE OF SERVICE

I, the undersigned, certify that on January 26, 2018, I served a copy of Respondent's Reply Brief on Petitioner's attorneys listed below by electronic service and that the electronic transmission was reported as complete. My e-mail address is attorney@scottstillsonlaw.com.

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